Hamidah Fazilah Sdn Bhd v Universiti Tun Hussein Onn Malaysia (UTHM)

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22C-31–05 OF 2016
LEE SWEE SENG J
21 NOVEMBER 2016

Arbitration — Stay of proceedings — Application — Defendant vide design and build contract appointed plaintiff as contractor for construction of multipurpose hall — Defendant failed to pay plaintiff for additional works done — Plaintiff commenced action against defendant for outstanding sum — Defendant applied for stay of proceedings pending reference to arbitration based on s 10 of the Arbitration Act 2005 — Whether defendant taken further steps in proceedings — Whether dispute subject matter of arbitration agreement — Whether parties submission to exclusive jurisdiction of courts of Malaysia would negate arbitration agreement — Arbitration Act 2005 s 10

The plaintiff was appointed by the defendant vide a design and build contract ('the contract') as contractor for construction of a multipurpose hall ('the project'). The present action was brought by the plaintiff as consequence of the failure of the defendant to pay the sum of RM22,677,356.87 for additional works for the project. In response, the defendant's solicitors had written a letter to the plaintiff's solicitors requesting for further and better particulars of the plaintiff's statement of claim ('the letter'). Subsequently, the defendant filed encl 6 for an application for stay of the court proceedings pending reference to arbitration under s 10 of the Arbitration Act 2005. It must be noted that arbitration agreement was provided under cl 67.0 of the contract and that the parties vide cl 70.0 of the contract had submitted to the jurisdiction of the High Court. The issues for court's decision were: (a) whether the defendant had taken further steps in the proceedings as to disentitled them to apply for a stay; (b) whether the matter, dispute or difference was the subject matter of the arbitration agreement ie cl 67.0 of the contract; and (c) whether cl 70.0 of the contract on governing law and the submission to the exclusive jurisdiction of the courts of Malaysia would negate the arbitration agreement altogether.

Held, allowing encl 6 with costs of RM5,000:

(1) There was no prayer for an order for better and further particulars to be furnished by the plaintiff and that all the other prayers in the single application filed had been withdrawn with the exception of the prayer (c) for the proceedings to be stayed pending reference to arbitration. At most the request for further and better particulars in the whole context of the

letter was only an act preparatory to taking a further step in the proceedings and not a further step in the proceedings (see para 20).

(2) A holistic reading of cl 67.4 of the contract and the word 'Such reference' at the beginning of the said clause (which refer to the obligation of parties to refer the dispute to arbitration) would suggest that the really effective way of resolving all matters, disputes and difference could only commence after the completion of the works, indicating that there was nothing strange and indeed everything sensible for all the disputes finalised after the completion of works to be referred to arbitration (see para 41).

(3) The claim in the present case was in relation to the variation of the work done during the stage after commencement of the works and before completion of the works. As the defendant's contention was that the so-called variation work was within the scope of work in the contract, the court was satisfied that the dispute was with respect to the matter arising before the completion of the works. Therefore even if one were to interpret the arbitration agreement narrowly, the court would still say that the arbitration agreement applies to such a matter, dispute or difference that had arisen before the completion of the works (see para 43).

(4) There was no contradiction between the applicability of the arbitration cl 67.0 and cl 70.0 in relation to the submission of parties to the jurisdiction of the High Court. This was clearly a case where a holistic and harmonious approach was to be followed, giving effect to the clear intention of the parties to resolve all matters arising out of or in connection with the contract to arbitration. At the same time parties affirmed that where they had to approach the court to aid and assist them, they would then submit to the exclusive jurisdiction of the Malaysian courts (see paras 53 & 57).

[Bahasa Malaysia summary

Plaintif telah dilantik oleh defendan melalui kontrak reka bentuk dan binaan ('kontrak tersebut') sebagai kontraktor untuk pembinaan dewan serbaguna ('projek tersebut'). Tindakan ini telah dimulakan oleh plaintif akibat kegagalan defendan membayar jumlah RM22,677,356.87 untuk kerja tambahan bagi projek tersebut. Sebagai jawapan, peguamcara defendan telah menulis surat kepada peguamcara plaintif memohon butiran lanjut dan lebih baik penyataan tuntutan plaintif ('surat tersebut'). Berikutan itu, defendan telah memfailkan lampiran 6 untuk permohonan penggantungan prosiding mahkamah sementara menunggu rujukan untuk timbang tara di bawah s 10 Akta Timbang Tara 2005. Ia perlu ditekankan perjanjian timbang tara telah diperuntukkan di bawah fasal 67.0 kontrak tersebut dan bahawa pihak-pihak melalui fasal 70.0 kontrak telah dikemukakan kepada bidang kuasa

Mahkamah Tinggi. Isu untuk keputusan mahkamah adalah: (a) sama ada defendan telah mengambil langkah selanjutnya dalam prosiding tersebut untuk menidakkan hak mereka memohon penggantungan; (b) sama ada perkara, pertikaian atau perbezaan itu adalah hal perkara perjanjian timbang tara iaitu fasal 67.0 kontrak; dan (c) sama ada fasal 70.0 kontrak berhubung undang-undang kawalan dan penyerahan kepada bidang kuasa eksklusif mahkamah Malaysia akan menyangkal perjanjian timbang tara sama sekali.

Diputuskan, membenarkan lampiran 6 dengan kos sebanyak RM5,000:

(1) Tiada permohonan untuk perintah bagi butiran yang lebih baik dan selanjutnya dikemukakan oleh plaintif dan bahawa semua permohonan lain dalam satu permohonan yang difailkan telahpun ditarik balik dengan pengecualian permohonan (c) agar prosiding tersebut digantung sementara menunggu rujukan kepada timbang tara. Paling tidak permohonan untuk butiran lanjut dan lebih baik dalam konteks keseluruhan surat tersebut hanya tindakan penyediaan untuk mengambil langkah selanjutnya dalam prosiding tersebut dan bukan langkah selanjutnya dalam prosiding tersebut (lihat perenggan 20).

(2) Bacaan menyeluruh fasal 67.4 kontrak dan perkataan 'Such reference' pada awal fasal tersebut (yang merujuk kepada kewajipan pihak-pihak untuk merujuk pertikaian itu kepada timbang tara) akan mencadangkan bahawa cara yang benar-benar berkesan menyelesaikan semua perkara, perselisihan dan perbezaan hanya boleh dimulakan selepas selesai kerja-kerja, yang menunjukkan bahawa tiada apa yang pelik dan sebenarnya segala yang masuk akal untuk semua pertikaian dimuktamadkan selepas selesai kerja-kerja yang perlu dirujuk kepada timbang tara (lihat perenggan 41).

(3) Dakwaan dalam kes ini adalah berkaitan dengan pengubahan kerja yang dilakukan semasa peringkat selepas memulakan kerja dan sebelum selesai kerja-kerja. Oleh kerana hujah defendan adalah bahawa kerja pengubahan tersebut adalah dalam skop kerja dalam kontrak tersebut, mahkamah berpuas hati bahawa pertikaian itu berkenaan dengan perkara yang timbul sebelum selesai kerja-kerja. Oleh itu, walaupun jika seseorang itu mentafsir secara sempit perjanjian timbang tara tersebut, mahkamah tersebut masih akan mengatakan bahawa perjanjian timbang tara itu terpakai kepada apa-apa perkara, pertikaian atau perselisihan yang telah timbul sebelum penyiapan kerja-kerja (lihat perenggan 43).

(4) Tidak ada percanggahan antara tidaknya timbang tara fasal 67.0 dan fasal 70.0 berhubung dengan penyerahan pihak kepada bidang kuasa Mahkamah Tinggi. Ini jelas satu kes di mana pendekatan yang menyeluruh dan harmoni perlu diikut, dalam melaksanakan niat jelas pihak-pihak untuk menyelesaikan semua perkara yang berbangkit daripada atau berkaitan dengan kontrak kepada timbang tara tersebut.

Pada masa yang sama pihak-pihak menegaskan bahawa di mana mereka perlu tampil ke mahkamah untuk menolong dan membantu, mereka dengan itu akan menyerah kepada bidang kuasa eksklusif mahkamah Malaysia (lihat perenggan 53 & 57).]

Notes

For cases on application, see 1(2) *Mallal's Digest* (5th Ed, 2015) paras 2082–2132.

Cases referred to

Chin Keat Seng v Lee Yoke Yam & Ors [2009] 1 LNS 1799, HC (refd)
CLLS Power System Sdn Bhd v Sara Timur Sdn Bhd [2015] 11 MLJ 485, HC (refd)
CMS Energy Sdn Bhd v Poscon Corp [2008] 6 MLJ 561, HC (refd)
ELF Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd [1986] 1 MLJ 177 (distd)
KNM Process Systems Sdn Bhd v Mission Biofuels Sdn Bhd [2012] MLJU 839; [2013] 1 CLJ 993, HC (refd)
Lembaga Pelabuhan Kelang v Kuala Dimensi Sdn Bhd and another appeal [2011] 2 MLJ 606; [2010] 9 CLJ 532, CA (refd)
Life Plaza Sdn Bhd v Pasukhas Construction Sdn Bhd [2012] MLJU 176, HC (refd)
Pathak v Tourism Transport Ltd [2002] 3 NZLR 681, HC (refd)
Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417, FC (refd)
Rightmove Sdn Bhd v YWP Construction Sdn Bhd & Anor [2015] 7 MLJ 687, HC (refd)
Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor [2002] 2 MLJ 625, FC (refd)
ZAQ Construction Sdn Bhd & Anor v Putrajaya Holdings Sdn Bhd [2014] 10 MLJ 633, HC (refd)

Legislation referred to

Arbitration Act 1952 (repealed by Arbitration Act 2005) s 6
Arbitration Act 2005 ss 10, 10(1), 11, 18(1), 37, 38, 42
Rules of Court 2012 O 18 rr 19(a), (b), (d), 12(6), O 24 r 10

Abd Shukor bin Tokachil (Shukor & Assoc) for the plaintiff.
Mohaji bin Selamat (Mohaji Hazury & Ismail) for the defendant.

Lee Swee Seng J:

[1] The plaintiff is a contractor appointed by the defendant under a design and build contract with respect to the construction and completion of a multipurpose hall in Universiti Tun Hussein Onn Malaysia at Batu Pahat,

Johor Darul Takzim. The contract dated 3 May 2011 is based on the PWD Form DB (Rev 2007).

[2] The contract sum was for RM30,550,000. The revised contract sum was RM37,580,900.12 after taking into account additional works and provisional sum. The plaintiff had made various interim progress claims Nos 1–13 and these had been paid by the defendant.

[3] The present action by the plaintiff is for the sum of RM22,677,356.87 for additional works. The defendant's stand as stated in their affidavit is that these additional works fell within the scope of the design and build contract and so are not payable. The defendant further contended that there was a delay of one year in the completion of the works and so they are entitled to LAD claim of RM5,300 per day and with 141 days of delay the total amount of LAD is RM747,300. The defendant further stated in their affidavit that a sum of RM36,932,461.79 had been paid as at 12 October 2011.

PRAYERS

[4] There were initially several prayers in encl 6 filed by the defendant. These included a prayer for striking out the statement of claim pursuant to O 18 r 19(a), (b) and (d) of the Rules of Court 2012 ('the ROC 2012') as well as a prayer for an order to strike out certain paragraphs in the statement of claim filed herein.

[5] There was also prayer (c) which is the defendant's application for stay of the court proceedings under s 10(1) of the Arbitration Act 2005 pending reference of the dispute that has arisen to arbitration.

[6] At the hearing of encl 6, learned counsel for the defendant had withdrawn all the other prayers other than prayer (c) and so these other prayers were struck out.

[7] Thus encl 6 is confined only to the prayer for stay of the court proceedings pending reference to arbitration under s 10 of the Arbitration Act 2005.

PRINCIPLES

[8] Section 10 of the Arbitration Act 2005 provides as follow:

> 10 Arbitration agreement and substantive claim before court
>
> (1) A court before which proceedings are brought in respect of a *matter* which is the *subject of an arbitration agreement* shall, where a party makes an

application *before taking any other steps in the proceedings, stay* those proceedings and *refer the parties to arbitration* unless it finds that the agreement is null and void, inoperative or incapable of being performed

(2) The Court, in granting a stay proceeding pursuant to subsection (1), may impose any conditions as it deems fit. (Emphasis added.)

[9] Therefore, if the defendant that is being brought to court, has not taken any other steps in the court proceedings, the court shall grant a stay of the proceedings, as an arbitration agreement is a term of the contract and the court would give effect to it.

[10] The exception is when the said agreement is null and void, inoperative or incapable of being performed, then the court would not grant a stay of the proceedings and the parties in such an instance would have to proceed with litigation in court.

WHETHER THE DEFENDANT IN THIS CASE HAD TAKEN FURTHER STEPS IN THE PROCEEDINGS SUCH AS TO DISENTITLE THEM TO APPLY FOR A STAY

[11] The plaintiff complained that the defendant had through their solicitors on 7 June 2016 written to the plaintiff's solicitors requesting for further and better particulars of paras 70–74 of the plaintiff's statement of claim. See exh HS2 in encl 8. This, the plaintiff submitted is 'taking any other steps in the proceedings' disentitling them under s 10 of the Arbitration Act 2005 for an order for stay.

[12] The Federal Court of *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625, decided under the Arbitration Act 1952 was cited as authority for this proposition. At p 631 it was held as follow:

> At this juncture, we note the existence of one salient fact in *Usahabina* which was mentioned in passing by the learned JC, but unfortunately not properly appreciated by him. It is this fact. In that case, the defendant who had entered an unconditional appearance failed to file his defence within the time limited for doing so. *He had requested for, and the plaintiff had agreed to, an extension of one week to file the defence. Pausing here for a moment, what the defendant did was clearly a step in the proceedings within the meaning of s 6 of the Act by requesting an extension of time to file the defence, clearly indicating an intention to deliver a statement of defence, thus abandoning the right to arbitration*.
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> ...
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> While the learned JC correctly noted that in substance, the application of the defendant was primarily to have the judgment set aside and consequently for the case to be stayed pending reference to arbitration or, alternatively, for leave to be allowed to file his defence and other relevant documents, *the learned JC erred in*

failing to take into account that the defendant had gone a step further than the entry of an unconditional appearance in that, as hereinbefore mentioned, he had requested an extension of time to file his statement of defence. The defendant's belated attempt to resort to arbitration was an afterthought after judgment in default had been entered against him. (Emphasis added.)

[13] Furthermore, the Federal Court in determining the issue in relation to 'taking step in proceeding' explained at p 634 as follow:

The words underlined do not appear in the Malaysian Act. Under the English Act, it is very clear that the first step of entering an appearance is not included in the phrase 'other steps in the proceedings'. The time frame prescribed for applying to the court for a stay of the proceedings is 'at any time after appearance' but before 'delivering any pleadings' or 'before taking any other steps in the proceedings'. If the applicant has taken his first step in the proceedings by entering an appearance, that step is a permissible step that is not considered to be a step in the proceedings that would bar an application for stay. *However, if the applicant has subsequently delivered any pleadings, or taken any other step in the proceedings which indicates his election to allow the action to proceed in the court, the applicant will be considered to have abandoned his right to seek recourse to arbitration and would be barred from applying for a stay of the proceedings*. *Halsbury's Laws of England* (4th Ed, Reissue) para 627, at pp 347–348, explains the situation:

> The applicant must have taken no step in the proceedings after acknowledgment of service. A step in the proceedings is an act which both invokes the jurisdiction of the court and which demonstrates the applicant's election to allow the action to proceed. An applicant may take what would otherwise be a step if he makes it clear that the act is done without prejudice to his right to apply for a stay. *Steps in the proceedings have been held to include: the filing of an affidavit in opposition to a summons for summary judgment, service of defence, and an application to the courts for leave to serve interrogatories, or for a stay pending the giving of security for costs or for an extension of time for serving a defence, or for an order for discovery, or for an order for further and better particulars.* (Emphasis added.)

[14] I think the context of the letter asking for further and better particulars must be looked into to ascertain if the defendant had evinced a clear and unequivocal intention to abandon arbitration and to elect for litigation to resolve the dispute that had arisen.

[15] Paragraph 2 of the said letter started off by the solicitors for the defendant categorically stating that the action filed by the plaintiff in the High Court is inconsistent with the intention of the parties under cl 67 of the contract to proceed with arbitration to resolve all matters, disputes and differences arising out of or in connection with the contract. The whole of cl 67 was then set out.

[16] Paragraph 3 of the said letter reiterates that the reference should be to arbitration as agreed by the parties to the contract.

[17] The last paragraph in para 6 ended with the note that their client, the defendant, shall apply for a stay of the proceedings pending reference to arbitration pursuant to cl 67 of the contract and that the defence be filed after the disposal of the application for stay.

[18] In such a context, it can hardly be said that the request for further and better particulars of certain paragraphs of the statement of claim that the contract had been signed under coercion and duress, is a further step in the proceedings when all that the defendant wanted is to understand the claim better. The defendant's solicitors in their said letter expressed their bewilderment at this allegation because it was not stated who in the defendant had been guilty of coercion and duress here and the particulars of the coercion and duress. Furthermore progress claims No 5–13 had been paid by the defendant and that at no material time had there been any allegation of coercion and duress. Certificate of practical completion had also been issued in August 2012 and there was not the slighted suggestion of coercion and duress until the filing of this action in court. The defendant's solicitors stated that the further and better particulars are needed to help the defendant prepare their defence. This is to be differentiated from filing a defence as even when the claim should be referred to arbitration, the defendant would still need to prepare its defence.

[19] The request for further and better particulars is generally made because before an application is made to court for an order that those particulars be given, the applicant must show that he has written by letter for the particulars he requires or else the court may refuse to make the order unless the court is of the opinion that there were insufficient reasons for an application by letter not having been made. See O 18 r 12(6) of the ROC 2012.

[20] What is more important was that there was no prayers for an order for better and further particulars to be furnished by the plaintiff and that all the other prayers in the single application filed had been withdrawn with the exception of the prayer (c) for the proceedings to be stayed pending reference to arbitration. At most the request for further and better particulars in the whole context of the said letter is only an act preparatory to taking a further step in the proceedings and not a further step in the proceedings.

[21] In *Life Plaza Sdn Bhd v Pasukhas Construction Sdn Bhd* [2012] MLJU 176, Justice Amelia Tee Abdullah J held that the defendant's action there in serving a notice to produce documents mentioned in the pleadings as well as a letter asking for further and better particulars are no doubt 'other actions' as

stated by the Federal Court in *Sanwell Corp* but that they are not positive steps that amount to an unequivocal intention to proceed with the suit and hence they do not amount to having taken positive steps in the proceedings.

[22] In *CLLS Power System Sdn Bhd v Sara Timur Sdn Bhd* [2015] 11 MLJ 485, Justice Mary Lim J (now JCA) held that the defendant's notice to produce documents referred to in pleadings issued pursuant to O 24 r 10 of the ROC 2012 without any qualification or reservation is a further step in the proceedings that would disqualify them from getting a stay of the proceedings.

[23] In our present case the letter requesting for better and further particulars was qualified with the clear intention expressed in paras 2, 3, 4 and 6 to proceed with arbitration and that a stay for this purposes will be applied for.

[24] The New Zealand case of *Pathak v Tourism Transport Ltd* [2002] 3 NZLR 681 is often cited as authority for the proposition that a request for further and better particulars is a step in the proceedings. The plaintiff there had filed proceedings in court seeking interim relief with reference to an arbitration agreement. After the application for the interim relief had been settled, the plaintiff applied for a stay of the court proceedings and an order to refer to dispute to arbitration.

[25] However upon a closer reading of the case, it would be obvious that the High Court there, was influenced by the fact of multiple actions being taken by the plaintiff/applicant, that included not just seeking further and better particulars of the defence but also providing further particulars of their statement of claim, verifying list of documents, filing a memorandum setting out a summary of plaintiff's claim, attending directions conference before the Master and also inspecting documents contained in the defendant's list of documents. It was in that context that the High Court held that there was delay in applying for stay and that significant steps have been taken in the proceedings such that the plaintiff is said to have elected to submit the dispute to the court.

[26] In the present case, the plaintiff could not be said to be in doubt as to the true intention of the defendant which was expressly stated as proceeding with arbitration in resolving the disputes and that the defendant could not be said to have elected to proceed with litigation and to have waived their rights to proceed with arbitration. There must be a significant step taken in the proceedings in court to signal a shift of intention to forgo arbitration for litigation; to abandon arbitration and to accept the submission to the jurisdiction of the court that the plaintiff had initiated.

[27] In the light of the new regime introduced by the UNCITRAL Model Law and which principles are incorporated into the Arbitration Act 2005, parties should be given every encouragement and facility to go for arbitration as they have agreed in the arbitration agreement and absent a clear intention to abandon that altogether, the court should hold the parties to their bargain in keeping with the parties' expressed intention.

[28] It must also be said in passing that there is no impediment to the arbitrator deciding on the issue of the validity of the arbitration agreement even though the plaintiff had raised coercion and duress in the execution of the contract containing the arbitration agreement. Section 18(1) of the Arbitration Act 2005 provides that the arbitrator may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. Learned counsel for the defendant referred to the case of *Chin Keat Seng v Lee Yoke Yam & Ors* [2009] 1 LNS 1799, where a similar approach was taken when there were allegations of invalidity of the arbitration agreement.

WHETHER THE MATTER, DISPUTE OR DIFFERENCE IS THE SUBJECT MATTER OF THE OF THE ARBITRATION AGREEMENT

[29] In *ZAQ Construction Sdn Bhd & Anor v Putrajaya Holdings Sdn Bhd* [2014] 10 MLJ 633 at p 643, Justice Mary Lim J (now JCA) emphasised the mandatory language in which s 10(1) is couched with respect to a stay of court proceedings when there is a valid arbitration clause:

> [26] It will be appreciated that the language in sub-s 10(1) is couched in mandatory terms with the use of the word 'shall'. Where the terms of sub-s 10(1) are met, the court is obliged to stay court proceedings and refer the parties to arbitration. The only exception to this is provided within sub-s 10(1) itself and that is where the court finds the 'agreement to be null and void, inoperative or incapable of being performed.

[30] This palpable paradigm shift towards upholding the bargain of the parties to arbitration and the readiness of the courts to grant a stay of proceedings with the advent of the Arbitration Act 2005 have been alluded to in a number of cases. In *CMS Energy Sdn Bhd v Poscon Corp* [2008] 6 MLJ 561 at p 569 it was observed as follows:

> [18] In my view if s 10 and s 18 of the Act are read together there is no unmistakable intention of the Legislature that the court should lean towards arbitration proceedings. Under s 10(1) of the Act, the Court shall stay all proceedings before it in respect of a matter which is the subject of an arbitration agreement, and refer the parties to arbitration unless the court is satisfied as to any of the condition in para (a) or (b) of the section as shown above. And in this case none of the condition is applicable.

[31] In *Rightmove Sdn Bhd v YWP Construction Sdn Bhd & Anor* [2015] 7 MLJ 687 at p 693 it was highlighted as follows:

> [14] Thus, from a reading of s 10(1) of the Act in its current form and the case authorities referred to above, it appears to me that the conditions requisite to the granting of stay of proceedings where there is an arbitration agreement are: (i) the current proceedings are in respect of a matter which is the subject of the arbitration agreement and (ii) the applicant has not taken any other steps in the proceedings. Once these are met, *the court is mandatorily required to refer the parties to arbitration* unless the plaintiff can show that the agreement is null and void, inoperative or incapable of being performed ... (Emphasis added.)

[32] Whilst under the old Arbitration Act 1952 the word used was 'may', under the new Arbitration Act 2005 the word used is now 'shall', signifying a clear shift towards referring such a matter to arbitration and indeed making it mandatory as opposed to the old Arbitration Act 1952 where the discretion is reposed with the court on whether or not to grant stay. This was once again highlighted in the Federal Court case of *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417 as follows:

> [31] Prior to the 2005 Act, the applicable law was the Arbitration Act 1952 ('the 1952 Act'). The issue of stay of proceedings in the 1952 Act was dealt with under s 6 thereof which reads:
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> > 6 If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, *may make an order staying the proceedings*.
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> [32] The clear effect of the present s 10(1) of the 2005 Act is to render a stay *mandatory* if the court finds that all the relevant requirements have been fulfilled; *while under s 6 of the repealed 1952 Act, the court had a discretion whether to order a stay or otherwise*. (Emphasis added.)

[33] Learned counsel for the plaintiff referred to the decision of Justice Mary Lim J (now JCA) in *ZAQ Construction Sdn Bhd & Anor v Putrajaya Holdings Sdn Bhd* [2014] 10 MLJ 633, where she had succinctly explained the jurisdictional issue in relation to the arbitration agreement as follow:

> [36] Subsection 10(1) requires the court to first and foremost examine whether the 'proceedings' in court today are 'brought in respect of a matter which is the subject of an arbitration agreement'. If the proceedings are indeed brought in respect of a

matter which the parties have agreed should be resolved by arbitration, then the court is obliged to stay these proceedings and 'refer the parties to arbitration'.

...

[38] As to whether the proceedings in court are in respect of a matter which is the subject of an arbitration agreement; that depends on what is the ambit of the arbitration agreement. But, even before that, it must first be recognised that it is the plaintiffs' claim before the court and not what the defendant's response or defence is to that claim which bears the brunt of scrutiny.

[34] Her Ladyship had emphasised the need to analyse the arbitration agreement in order to determine the jurisdictional issue. In the above cited case, the defendant application for stay pursuant to s 10 of the Arbitration Act 2005 was allowed based on the context of the arbitration agreement in that particular case. The relevant clause in that case read as follow:

[40] It is not in dispute that the arbitration agreement is to be found in cl 63 of the first contract which provides:

63.1(a) *If any dispute or difference shall arise between the Employer and the Contractor, either during the performance or after completion of the Design or the Works, or after the termination of the Contractor's employment, or breach of this Contract*, as to:

...

[41] The parties have agreed under cl 63 to refer 'any dispute or difference' which arises between the parties to arbitration. *Such dispute or difference may arise either during the performance or after completion of the design or the works, or after the termination of the contractor's employment, or breach of this contract*. The dispute may be on (a) the construction of this contract; (b) any matter or thing of whatever nature arising under this contract; or (c) the withholding by the ER of any certificate to which the contractor may claim to be entitled. (Emphasis added.)

[35] The arbitration clause in the said contract in cl 67 must now be looked at in its entirety as much debate has been raised regarding its application to the present claim of the plaintiff:

67.1 If any *dispute or difference* shall *arise* between the Government and the Contractor *out of in connection with the contract*, then the parties shall refer such matter, dispute or difference to the officer named in the Appendix 1 for the decision.

67.2 The decision of the officer named in Appendix 1 shall be in writing and shall subject to clause 67.4, *be binding on the parties until the completion of the Works and shall forthwith be given effect to by the Contractor* who shall proceed with the Works with all due diligence whether or not notice of dissatisfaction is given by him.

67.3 If the parties:

(a) Fail to receive a decision from the officer named in Appendix 1 within forty-five (45) days after being requested to do so, or

(b) Are dissatisfied with any decision of the officer named in Appendix 1

then such dispute or difference shall be referred to arbitration within forty-five days to an arbitrator to be agreed between the parties and failing such an agreement to be appointed by the Director of the Regional Centre for Arbitration in Kuala Lumpur on the application of either party hereto. Such arbitration shall be heard at the Kuala Lumpur Regional Centre for Arbitration and shall be conducted in accordance with rules for arbitration of the Kuala Lumpur Regional Centre for Arbitration using the facilities and the system available at the Centre.

67.4 Such reference, except on any difference or dispute under clause 66 shall not be commenced until after the completion or alleged completion of the Works or determination or alleged determination of the Contractor's employment under this Contract, or abandonment of the Works, unless with the written consent of the Government and the Contractor.

67.5 In the event that such consent has been obtained in accordance with clause 67.4, *the reference of any matter, dispute or difference to the arbitration pursuant to this clause and/or the continuance of any arbitration proceeding consequent thereto shall in no way operate as a waiver of the obligations of the parties to perform their respective obligations under this Contract.*

67.6 In the arbitration proceedings conducted pursuant to clause 67.3, the parties may make any counter claim in relation to any dispute or difference arising from the Contract.

67.7 The arbitrator shall have power to review and revise any certificate, opinion, decision, requisition or notice and to determine all matters in dispute which shall be submitted to him, and of which notice and to determine all matters in dispute which shall be submitted to him, and of which notice shall have given in accordance with clause 67.3 aforesaid, in the same manner as if no such certificate, opinion, decision, requisition or notice had been given.

67.8 Upon every or any such reference the cost such incidental to the reference and award shall be in the discretion of the Arbitrator who may determine the amount thereof, or direct the amount to be taxed as between solicitor and client or as between party and party and shall direct by whom and to whom and in what manner the same be borne, awarded and paid.

67.9 The award of the Arbitrator shall be final and binding on the parties.

67.10 In the event of the death of the Arbitrator or his unwillingness or inability to act, then the Government and the Contractor upon agreement shall appoint another person to act as the arbitrator, and in the event the Government and the Contractor fail to agree on appointment of an arbitrator, an arbitrator shall be appointed by the Director of the Regional Centre for Arbitration in Kuala Lumpur.

67.11 In the clause, 'reference' shall be deemed to be reference within the meaning of the Arbitration Act 2005.

67.12 The arbitration shall be governed by the Arbitration Act 2005 and the laws of Malaysia. (Emphasis added.)

[36] Learned counsel for the plaintiff then submitted that the ambit of the arbitration clause in the said contract document is that it is only confined to the

dispute during, and before the completion of the works and not after the completion of the works. He argued that it does not expressly state that the dispute after the completion of the works should be referred to the arbitration unlike the arbitration clause in the case of *ZAQ Construction Sdn Bhd* cited above.

[37] Learned counsel further argued that since cl 67.2 expressly provides that the decision of the officer shall be binding on the parties until the completion of the works and shall forthwith be given effect to by the contractor who shall proceed with the works with all due diligence whether or not notice of dissatisfaction is given by him, it would suggest that parties did not intend any disputes arising after the completion of the works to be referred to arbitration.

[38] That is an unduly restrictive and rigid interpretation of cl 67.0 on arbitration taken as a whole. When the general agreement in cll 67.1 and 67.3 is worded widely and expansively to cover any dispute or difference arising between the parties out of or in connection with the contract that shall be referred to arbitration, there is no reasonable and cogent excuse to then limit the dispute and difference to that which arises before the completion of the works. To do so would do violence to the language used and indeed would be totally misconceived.

[39] The reason why there are many sub clauses focusing on what would happen in the event of a reference to arbitration for a matter, dispute or difference that has arisen during the carrying out of the works is to ensure that the works are not delayed and will be carried through to completion. In other words a reference to arbitration would not have the effect of putting the works on hold and indeed the arbitration should not commence until the completion of the works so that the parties may focus on completing the works. Meanwhile under cl 67.2, the decision of the officer is binding on the parties.

[40] I see no good reason to strain the language of the arbitration agreement in cl 67.1 to unnaturally limit the dispute or difference or matter to one arising during the works and not after the completion of the works.

[41] In fact a holistic reading of cl 67.4 and the word '*Such reference*' at the beginning of the said clause (which refer to the obligation of parties to the refer the dispute to arbitration) would suggest that the really effective way of resolving all matters, disputes and difference can only commence after the completion of the works, indicating that there is nothing strange and indeed everything sensible for all the disputes finalised after the completion of works to be referred to arbitration.

[42] Clause 67.1 indicates that the obligation of the parties to resolve the issue between them, by referring the dispute to the officer named in Appendix 1 ie the vice chancellor of the defendant. Subsequently, cl 67.2 indicates that the decision of the said vice chancellor shall be binding, and the plaintiff is obligated to proceed with the Works with all due diligence. Section 67.3 indicates the steps that need to be taken should the parties be dissatisfied with the decision of the vice chancellor.

[43] In the present claim initiated by the plaintiff against the defendant here, the claim was in relation to the variation of the work done amounting to RM22,677,356.87. It was with respect to variation works done during the stage after commencement of the works and before completion of the works. As the defendant's contention is that the so-called variation work is within the scope of work in the original contract documents, this court is satisfied that the dispute is with respect to the matter arising before the completion of the works. Therefore even if one were to interpret the arbitration agreement narrowly, I would still say that the arbitration agreement applies to such a matter, dispute or difference that had arisen before the completion of the works.

[44] Learned counsel for the plaintiff then submitted that there is just a refusal of the defendant to pay and so there is no dispute that needs to be referred to arbitration. To say that is to miss the point altogether. The defendant is stating that what the plaintiff is claiming under variation works done is in reality within the scope of the original contract and thus within the original contract sum as the contract is a 'Design and Build' contract. It is very clear that a dispute has arisen between the parties with respect to whether the variation work was within the terms of the original contract or a variation within the terms of the contract. That is a matter for the arbitrator to decide in accordance with the terms of arbitration that the parties have agreed under the arbitration agreement.

[45] It must be noted that there was also a further amendment made to s 10 of the Arbitration Act 2005 such that whilst previously the court has to determine if there was a genuine dispute to be referred to arbitration, now the test is just whether or not there is a matter within the scope of the arbitration agreement that is to be referred to arbitration.

[46] Thus in *KNM Process Systems Sdn Bhd v Mission Biofuels Sdn Bhd* [2012] MLJU 839; [2013] 1 CLJ 993 it was highlighted this significant difference leaning towards upholding an arbitration agreement and correspondingly a stay of court proceedings would ordinarily be granted:

A [16] It is also evident with the amendment that it is now mandatory on the court to grant stay where the matter before it is the subject of an arbitration agreement unless the arbitration agreement is, in the words of the statute, 'null and void, inoperative or incapable of being performed'.

B [17] It is no longer possible to argue that in respect of the controversy between the parties there is no 'dispute' with regard to the matter to be referred to arbitration, which is a test which invites unnecessary ambiguity and requires the court to determine whether there is a 'dispute' between the parties not dissimilar to the function performed by the court in determining whether there is a triable issue in a summary judgment application. *The test is now simpler test of whether the matter*
C *before the court is the subject of an arbitration agreement or otherwise. To decide on the simpler test, if will become a matter of construction of the relevant arbitration agreement, where it exists.* (Emphasis added.)

[47] In the *Press Metal Sarawak Sdn Bhd*'s case the Federal Court explained as
D follows:

[28] The present s 10(1) of the 2005 Act (as amended vide Act A1395 which came into force on 1 July 2011 (the 2011 Amendment)) reads:

> 10(1) A court before which proceedings are brought in respect of a matter which
E is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

[29] Prior to the 2011 Amendment, s 10(1) provided as follows:

F > 10 Arbitration agreement and substantive claim before court
>
> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds —
G
> (a) that the agreement is null and void, inoperative or incapable of being performed; or
>
> (b) *that there is in fact no dispute* between the parties with regard to the matters to be referred.

H [30] Paragraph (b) of s 10(1) was completely repealed by the 2011 Amendment. *Previously, there must be in existence a dispute between the parties with regard to the matter to be referred*, before a court is empowered to make an order under s 10(1). With the deletion of para (b) the only remaining exception under the present s 10(1) is that the arbitration agreement between the parties is null and void,
I inoperative or incapable of being performed.

...

[33] What the court needs to consider in determining whether to grant a stay order under the present s 10(1) (after the 2011 Amendment) is whether there is in existence a binding arbitration agreement or clause between the parties, which

agreement is not null and void, inoperative or incapable of being performed. *The court is no longer required to delve into the details of the dispute or difference* (see *TNB Fuel Services Sdn Bhd).* In fact *the question as to whether there is a dispute in existence or not is no longer a requirement to be considered in granting a stay under s 10(1). It is an issue to be decided by the arbitral tribunal.* (Emphasis added.)

[48] Learned counsel referred to *ELF Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177 at p 179, wherein it was held as follows:

In my judgment what we have is a mere refusal to pay upon a claim which had been admitted as being owing to the plaintiffs. There is nothing to be settled by arbitration. On a true construction or clause XIV only claims which are *bona fide* disputes or are *bona fide* controversies, that call for settlement by arbitration. Where a claim is admitted it does not call for a settlement by arbitration. All that is called for is for payment of the admitted amount which can be by an action in the Courts as has been done in the instant case.

[49] The above case can be easily distinguished because in that case there was an admission on the claim. In our present case there is no admission. At any rate the issue of whether or not there is a dispute is now a matter for the arbitral tribunal to decide as the Federal Court has authoritatively held in *Press Metal Sarawak*'s case. The case of *ELF Petroleum* decided as it was under the old s 6 of the Arbitration Act 1952 is no longer applicable under the new Model Law regime introduced by the Arbitration Act 2005 with the decision of the Federal Court in *Press Metal Sarawak*'s case.

WHETHER CLAUSE 70.0 ON GOVERNING LAW AND THE SUBMISSION TO THE EXCLUSIVE JURISDICTION OF THE COURTS OF MALAYSIA WOULD NEGATE THE ARBITRATION AGREEMENT ALTOGETHER

[50] Learned counsel for the plaintiff submitted that the parties by agreeing to submit to the exclusive jurisdiction of the courts of Malaysia would be deemed to have abandoned arbitration altogether in favour of litigation. Clause 70.0 is reproduced below:

70.0 *LAW GOVERNING THIS CONTRACT*

70.1 This Contract shall be governed by and construed according to the law of Malaysia and the *parties irrevocably submit to the exclusive jurisdiction of the courts of Malaysia*.

70.2 The Contractor bind himself to acknowledge and accept as final in all respects within the country of domicile of the Contractor or elsewhere, any decision or *award of an Arbitrator* or *judgment in any court of Malaysia in relation to any dispute between the parties under this Contract*.

70.3 *This clause shall apply in all respects in case any such decision award or judgment is to be enforced in the courts of the country of domicile of the Contractor or elsewhere in any manner* ... (Emphasis added.)

[51] Learned counsel for the plaintiff drew this court's attention to the Court of Appeal's case of *Lembaga Pelabuhan Kelang v Kuala Dimensi Sdn Bhd and another appeal* [2011] 2 MLJ 606; [2010] 9 CLJ 532, when dealing with the issue of existence of the arbitration clause and the clause in relation to the submission to court jurisdiction, stated as follows:

> [29] By cl 11.1 ie, the arbitration clause, the parties herein have agreed, first, to resolve any dispute or difference between them arising out of or in connection with DA1. If that attempt fails, they may then refer the dispute or difference to arbitration. The arbitration clause is however subject to the variations and modification in DA1. Clause 2.3 of DA2 provides that in the event of any conflict in the interpretation of the terms of DA1 and DA2, the interpretation of the terms of DA2 shall prevail. This brings me to the first limb of cl 2.4 of DA2 which sets out the application of the laws of Malaysia as the governing law for the purpose of construction. *More importantly, by the second limb of cl 2.4, the parties have expressly agreed to 'submit to the jurisdiction of the courts of Malaysia in all matters connected with the obligation and liabilities of the parties under' DA2. Under DA3 cll 4.3 and 4.4, the parties have expressly agreed and incorporated identical provisions as in DA2 cll 2.3 and 2.4. I am of the view that 'the submission to court jurisdiction clauses' in the subsequent supplemental agreements had taken a completely new dimension. I have no doubt that the parties have reaffirmed their express predominant agreement to submit to the court's jurisdiction and have effectively abandoned arbitration.* Upon reading all these clauses conjunctively, I hold that there is a conflict in the interpretation of cl 11.1 in DA1 ie the 'arbitration clause' and 'the submission to the court jurisdiction clauses' in cll 2.4 and 4.4 in DA2 and DA3 respectively. *They contradict each other because effect could not be given to enable these clauses to function harmoniously*. They operate like discordant music in a chorus of legal expressions. It is simply impossible to have a concurrent and combined situation of arbitration and litigation. It is either arbitration or litigation.
>
> [30] In addition, unlike the peremptory word 'shall', the permissive word 'may' used in the arbitration clause ie, cl 11.1 of DA1 is capable of readily abandoning the discretion to refer to arbitration, and opting for litigation instead, as expressed and contractually agreed by the parties in the supplemental agreements DA2 and DA3 via 'the submission to court jurisdiction clauses' that 'the parties hereto hereby submit to the jurisdiction of the courts of Malaysia in all matters connected with the obligation and liabilities of the parties under this supplemental agreement'. *This construction is further strengthened when the parties have contractually agreed that the principal agreement DA1 including the word 'may' in the arbitration clause shall be read subject to 'the submission to court jurisdiction clauses' in the supplemental agreements which shall prevail. The irresistible conclusion is that while it is true the parties had originally intended to have the discretion to refer their disputes to arbitration, that discretion has been subsequently displaced, compromised or abandoned when they have expressly submitted to the jurisdiction of the court ie to litigate all matters connected with the obligation and liabilities of the parties under DA2 and DA3 to which DA1 is*

subject. The High Court actions are therefore within the jurisdiction of our High Court.

[52] Whereas in the case of *Lembaga Pelabuhan Kelang*, the arbitration clause was in one agreement and the 'submission to the jurisdiction of the court' in another agreement, in the present case, both clauses are in the same contract document. Clearly the parties could not have intended cl 70.1 to be read to oust arbitration as the parties have once again expressly referred to an 'award of an Arbitrator' in cl 70.2 and about enforcement of an award in cl 70.3.

[53] I find no contradiction between the applicability of the arbitration clause in the said contract document in cl 67.0 and the cl 70.0 in relation to the submission of parties to the jurisdiction of the High Court.

[54] As we are all aware, when it comes to certain reliefs in aid of arbitration and more so when it comes to setting aside and enforcement of an arbitral award, the parties seeking such reliefs would still have to come to the relevant court for assistance. To avoid bickering over what law to apply and which court to apply for such reliefs, parties have addressed this issue at the outset in governing law clause. As both the parties are incorporated in Malaysia and carrying out their business here and as the project is here, it makes every sense for the laws of Malaysia to apply. Parties have agreed to submit to the exclusive jurisdiction of the courts of Malaysia where there is a need to come to the Malaysian courts to apply for interim measures such as an injunction for instance under s 11 of the Arbitration Act 2005 or for setting aside the award under s 37 or to refer a question of law under s 42 or under s 38 for enforcement of the arbitral award.

[55] Section 11 of the Arbitration Act 2005 reads as follows:

> 11 Arbitration Agreement and Interim Measures by High Court
>
> (1) A party may, *before or during arbitral proceedings, apply to a High Court for any interim measure* and the High Court may make the following orders for:
>
> (a) security for costs;
>
> (b) discovery of documents and interrogatories;
>
> (c) giving of evidence by affidavit;
>
> (d) appointment of a receiver;
>
> (e) securing the amount in dispute, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court; [Am. Act A1395: s.5]
>
> (f) the preservation, interim custody or sale of any property which is the subject-matter of the dispute;

(g) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and

(h) an *interim injunction* or any other interim measure. (Emphasis added.)

[56] Where a harmonious interpretation is possible in an apparent contradiction at first reading, that interpretation is to be preferred lest the baby is thrown out together with the water in the bath tub. It must not be forgotten that such clauses are present in almost all standard form contracts and here we are dealing with the PWD Form DB contract. I cannot read cl 70.0 here as reflecting the intention of the parties to abandon arbitration altogether after having addressed their mind on the procedure to be followed before a reference to arbitration is made and when arbitration can be commenced as well as the consequences of proceeding with arbitration and the obligations of the parties set out in 11 subclauses in cl 67.0.

[57] This is clearly a case where a holistic and harmonious approach is to be followed, giving effect to the clear intention of the parties to resolve all matters arising out of or in connection with the contract to arbitration. At the same time parties affirm that where they have to approach the court to aid and assist them in the instances set out above, they would then submit to the exclusive jurisdiction of the Malaysian courts.

PRONOUNCEMENT

[58] For the all the reasons given above, I was constrained to grant a stay of the current court proceedings pursuant to an application under s 10(1) of the Arbitration Act 2005 pending reference to arbitration. I also granted costs of RM5,000 to the defendant/applicant and allocatur to be paid before extracting the order for costs.

Enclosure 6 allowed with costs of RM5,000.

Reported by Dzulqarnain Ab Fatar